Lee Kuang Gen v Tan Sri Dato' Seri Dr M Mahadevan a/l Mahalingam and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCvC)(W)-2021–10 OF 2021, W-02(NCvC)(W)-2155–11 OF 2021 AND W-02(NCvC)(W)-2156–11 OF 2021

HANIPAH FARIKULLAH, AZIZAH NAWAWI AND NANTHA BALAN JJCA

24 NOVEMBER 2023

Contract — Agreement — Sale of gold agreements — Purchaser claimed vendor carried on moneylending business and camouflaged as sale of gold bars by way of sale of gold agreement — Whether transacted sum was pursuant to sale of gold agreements — Whether disguise for moneylending — Whether subject to provisions of Moneylenders Act 1951 — Moneylenders Act 1951 ss 5(1), 10OA & 15

In or about July 2013, Lee Kuang Gen ('LKG') had introduced David Choong ('DC') to Tan Sri Dato' Seri Dr M Mahadevan a/l Mahalingam ('TSM') for the sale of gold bars by TSM. In respect of these transactions, the gold bars were sold and the proceeds of the sale were deposited into the bank account of the TSM. Between November 2013–January 2015, TSM had entered into four sale of gold agreements ('SOGAs') with DC ie SOGA 1 to 4 to sell/invest in gold ingots to the value of RM10,993,500. TSM's position was that he had transferred the gold to the said value to DC. In early 2015, TSM had requested that DC return the sum of RM2m and USD2m. TSM requested DC to pay the sum of RM10,043,500 but DC did not make the payment. DC filed Suit 2015 against TSM and nine others seeking, inter alia, a declaration that TSM had illegally loaned monies to DC in ten transactions which were unlawful and unenforceable under the Moneylenders Act 1951 ('the MLA'). TSM sued DC and LKG in Suit 2017 for collusion by way of inducement, misrepresentation and false promises of handsome returns of gold investments and causing TSM to enter into the SOGAs with DC amounting to RM10,493,500. TSM's claim was for the return of the said sum of RM10,493,500. DC filed a counterclaim in Suit 2017 seeking a declaration that all of TSM's ten loans to DC were in contravention of the MLA and were therefore illegal and/or void ab initio, an injunction to restrain TSM and his servants and agents from harassing, assaulting, threatening or committing any act to injure DC and his businesses and for general damages. Suit 2017 was allowed and LKG filed an appeal in Appeal 2021 and Appeal 2155 was filed by DC. The learned judge also dismissed Suit 2015, and this was the subject matter of Appeal 2156 by DC.

Held, allowing the appeals:

(1) The Tranche 1–6 of SOGA 1, were transfers of cash from TSM to DC. There was inconsistency in the financial transactions and their alignment with the purported nature of the agreement. The reversal of the financial flow raised doubts on the authenticity and credibility of TSM's claim that these were the claimed 'sale of gold' transactions. TSM had failed to provide an explanation as to why he transferred money to DC. Since Tranche 1–6 of SOGA 1 were cash remitted by TSM to DC, they were cash loans given by TSM to DC, disguised as sale of gold transactions. The learned judge was plainly wrong in her finding that SOGA 1 was purely a sale and purchase of gold. The learned judge failed to consider the banking documents which showed the remittance of cash from TSM to DC, which corresponded with the 'Amount Invest' in SOGA 1 and the 'dividends' were actually interest of 9% pa on the respective cash loans. SOGA 1 neither substantiated nor served as evidence for the existence of six gold sale transactions but was a sham document and did not represent a valid sale and purchase of gold (see paras 28, 37–38, 43–44 & 47).

(2) A rebuttable presumption that TSM had carried on a moneylending business by granting six cash loans to DC without a moneylender's license had arisen pursuant to s 10OA of the MLA. The rebuttable presumption arose because there were undisputed contemporaneous documents in the form of the TSM remittance forms, TSM bank statements and DC bank statements which proved that DC had obtained the loans and paid interest at 9% pa to TSM. The learned judge had failed to consider the application of s 10OA of the MLA. TSM had failed to rebut the presumption under s 10OA MLA. DC had discharged the legal and evidential burden under ss 101(1), (2) and 102 of the Evidence Act 1950 to prove on the balance of probabilities that TSM had carried on a moneylending business contrary to s 5(1) of the MLA by making the six cash loans subject to the payment of interests, to DC and the same was camouflaged as a sale of gold bars by way of SOGA 1. The loans were void and unenforceable under s 15 of the MLA. In addition, when an agreement was found to be illegal, it was also void under s 24 of the Contracts Act 1950. The court would not render assistance to TSM in seeking to enforce such transactions and recover the monies as the remedy of restitution under s 66 of the Contracts Act 1950 would not avail to him (see paras 51–56).

(3) The six Tranches in SOGA 2 were the same as in SOGA 1, and therefore they were cash loans from TSM to DC with interest at 9% pa. The six cash loans were in contravention of s 5(1) of the MLA and were therefore void under s 15 of the MLA. In respect of Tranche 7–9 of SOGA 2, DC had established the monthly interest payment to TSM. Therefore, as these gold transactions had been monetised into cash loans and bearing interests, these transactions were also caught by the MLA and were therefore void (see paras 58, 67 & 69).

(4) In respect of SOGA 3, Tranche 1–9 were reproductions of SOGA 1 and SOGA 2. All nine transactions were cash loans disguised as sale and purchase of gold and were therefore void under the MLA. SOGA 4, which was a restatement of SOGA 1 to SOGA 3, was a moneylending business, which was contrary to s 5(1) of the MLA. The said loans were camouflaged by way of SOGA 1 to SOGA 3 and were in truth loans by TSM to DC, repayable with interest (see paras 70 & 77).

(5) The definition of money was wide enough to encompass not only traditional forms of currency but also assets that could be readily converted into cash. This would definitely include gold and cryptocurrencies. Tranche 7–9 of SOGA 2 and Tranche 10 of SOGA 3 were initially in the form of gold bars. However, subsequently the parties agreed that these transactions be converted into cash values (principal loan sum) with interest payments paid on the principal loan sum. Therefore, since the gold bars had been converted into cash (monetised) form, then these money loans were caught under the MLA. In addition, the act of TSM demanding DC to repay the money clearly showed that he did not sell gold to DC. Since the SOGAs entered between TSM and DC were contrary to the MLA, they were void ab initio and the effect of such illegal transaction was that the 'loss lies where it falls'. Therefore, TSM could not sue DC to recover losses (see paras 80–82 & 86).

[Bahasa Malaysia summary

Pada atau kira-kira Julai 2013, Lee Kuang Gen ('LKG') telah memperkenalkan David Choong ('DC') kepada Tan Sri Dato' Seri Dr M Mahadevan a/l Mahalingam ('TSM') untuk penjualan jongkong emas oleh TSM. Berkenaan dengan urus niaga ini, jongkong emas telah dijual dan hasil jualan telah dimasukkan ke dalam akaun bank TSM. Antara November 2013 hingga Januari 2015, TSM telah memeterai empat perjanjian penjualan emas ('SOGA') dengan DC iaitu SOGA 1 hingga 4 untuk menjual/melabur jongkong emas dengan nilai RM10,993,500. Pendirian TSM adalah beliau telah memindahkan emas kepada nilai tersebut kepada DC. Pada awal tahun 2015, TSM telah meminta DC mengembalikan jumlah RM2 juta dan USD2 juta. TSM meminta DC membayar jumlah RM10,043,500 tetapi DC tidak membuat pembayaran. DC memfailkan Saman 2015 terhadap TSM dan sembilan yang lain memohon, antara lain, pengisytiharan bahawa TSM telah meminjamkan wang secara haram kepada DC dalam sepuluh transaksi yang menyalahi undang-undang dan tidak boleh dikuatkuasakan di bawah Akta Pemberi Pinjam Wang 1951 ('APW'). TSM menyaman DC dan LKG dalam Saman 2017 kerana bersubahat dengan cara dorongan, salah nyata dan janji palsu mengenai pulangan pelaburan emas yang lumayan dan menyebabkan TSM memeterai SOGA dengan DC berjumlah RM10,493,500. Tuntutan TSM adalah untuk mengembalikan jumlah tersebut sebanyak RM10,493,500. DC memfailkan tuntutan balas dalam Saman 2017 untuk

mendapatkan pengisytiharan bahawa kesemua sepuluh pinjaman TSM kepada DC adalah melanggar APW dan oleh itu adalah menyalahi undang-undang dan/atau tidak sah ab initio, injunksi untuk menghalang TSM dan pekhidmat dan ejennya daripada mengganggu, menyerang, mengugut atau melakukan apa-apa tindakan untuk mencederakan DC dan perniagaannya dan untuk ganti rugi am. Saman 2017 telah dibenarkan dan LKG memfailkan rayuan dalam Rayuan 2021 dan Rayuan 2155 difailkan oleh DC. Hakim yang bijaksana juga menolak Saman 2015, dan ini adalah subjek Rayuan 2156 oleh DC.

Diputuskan, membenarkan rayuan-rayuan:

(1) Tranche 1–6 SOGA 1, adalah pemindahan wang tunai daripada TSM ke DC. Terdapat ketidakkonsistenan dalam urus niaga kewangan dan penjajarannya dengan sifat perjanjian yang dikatakan. Pembalikan aliran kewangan menimbulkan keraguan terhadap ketulenan dan kredibiliti dakwaan TSM bahawa ini adalah urus niaga 'penjualan emas' yang didakwa. TSM telah gagal memberikan penjelasan mengapa beliau memindahkan wang ke DC. Memandangkan Tranche 1–6 SOGA 1 adalah wang tunai yang dihantar oleh TSM kepada DC, ia adalah pinjaman tunai yang diberikan oleh TSM kepada DC, yang menyamar sebagai transaksi penjualan emas. Hakim yang bijaksana jelas salah dalam penemuannya bahawa SOGA 1 adalah semata-mata jual beli emas. Hakim yang bijaksana gagal mempertimbangkan dokumen perbankan yang menunjukkan penghantaran wang tunai daripada TSM ke DC, yang sepadan dengan 'Amount Invest' dalam SOGA 1 dan 'dividen' sebenarnya adalah faedah 9% setahun ke atas pinjaman tunai. SOGA 1 tidak dibuktikan atau dijadikan bukti kewujudan enam transaksi penjualan emas tetapi merupakan dokumen palsu dan tidak mewakili jual beli emas yang sah (lihat perenggan 28, 37–38, 43–44 & 47).

(2) Anggapan boleh disangkal bahawa TSM telah menjalankan perniagaan pinjaman wang dengan memberikan enam pinjaman tunai kepada DC tanpa lesen pemberi pinjaman wang telah timbul menurut s 10OA APW. Anggapan boleh disangkal timbul kerana terdapat dokumen kontemporari yang tidak dipertikaikan dalam bentuk borang kiriman wang TSM, penyata bank TSM dan penyata bank DC yang membuktikan bahawa DC telah memperoleh pinjaman dan membayar faedah pada 9% setahun kepada TSM. Hakim yang bijaksana telah gagal untuk mempertimbangkan pemakaian s 10OA APW. TSM telah gagal untuk menyangkal anggapan di bawah s 10OA APW. DC telah melepaskan beban perundangan dan keterangan di bawah ss 101(1), (2) dan 102 Akta Keterangan 1950 untuk membuktikan atas imbangan kebarangkalian bahawa TSM telah menjalankan perniagaan pinjaman wang yang bertentangan dengan s 5(1) APW dengan membuat enam pinjaman tunai tertakluk kepada pembayaran faedah, kepada DC dan

yang sama disamarkan sebagai penjualan jongkong emas melalui SOGA 1. Pinjaman itu tidak sah dan tidak boleh dikuatkuasakan di bawah s 15 APW. Di samping itu, apabila perjanjian didapati menyalahi undang-undang, ia juga terbatal di bawah s 24 Akta Kontrak 1950. Mahkamah tidak akan memberikan bantuan kepada TSM dalam usaha untuk menguatkuasakan urus niaga tersebut dan mendapatkan semula wang kerana remedi pengembalian di bawah s 66 Akta Kontrak 1950 tidak akan terpakai kepadanya (lihat perenggan 51–56).

(3) Enam Tranche dalam SOGA 2 adalah sama seperti dalam SOGA 1, dan oleh itu ia adalah pinjaman tunai daripada TSM kepada DC dengan faedah 9% setahun. Enam pinjaman tunai itu melanggar s 5(1) APW dan oleh itu terbatal di bawah s 15 APW. Berkenaan dengan Tranche 7–9 SOGA 2, DC telah membuktikan pembayaran faedah bulanan kepada TSM. Oleh itu, memandangkan urus niaga emas ini telah ditukarkan kepada pinjaman tunai dan mempunyai faedah, urus niaga ini juga telah tertakluk oleh APW dan oleh itu tidak sah (lihat perenggan 58, 67 & 69).

(4) Berkenaan dengan SOGA 3, Tranche 1–9 adalah pengeluaran semula SOGA 1 dan SOGA 2. Kesemua sembilan transaksi adalah pinjaman tunai yang menyamar sebagai jual beli emas dan oleh itu tidak sah di bawah APW. SOGA 4, yang merupakan pernyataan semula SOGA 1 kepada SOGA 3, adalah perniagaan pinjaman wang, yang bertentangan dengan s 5(1) APW. Pinjaman tersebut telah disamarkan melalui SOGA 1 hingga SOGA 3 dan sebenarnya pinjaman oleh TSM kepada DC, perlu dibayar balik dengan faedah (lihat perenggan 70 & 77).

(5) Takrif wang adalah cukup luas untuk merangkumi bukan sahaja bentuk mata wang tradisional tetapi juga aset yang boleh ditukar kepada tunai dengan mudah. Ini pastinya termasuk emas dan mata wang kripto. Tranche 7–9 SOGA 2 dan Tranche 10 SOGA 3 pada mulanya adalah dalam bentuk jongkong emas. Walau bagaimanapun, seterusnya pihak-pihak bersetuju bahawa urus niaga ini ditukar kepada nilai tunai (jumlah pinjaman pokok) dengan bayaran faedah dibayar ke atas jumlah pinjaman pokok. Oleh itu, memandangkan jongkong emas telah ditukar kepada bentuk tunai (diwangkan), maka pinjaman wang ini telah tertakluk di bawah APW. Selain itu, tindakan TSM menuntut DC membayar balik wang tersebut jelas menunjukkan beliau tidak menjual emas kepada DC. Memandangkan SOGA yang dimeterai antara TSM dan DC adalah bertentangan dengan APW, ia adalah terbatal ab initio dan kesan daripada transaksi tidak sah tersebut ialah 'loss lies where it falls'. Oleh itu, TSM tidak boleh menyaman DC untuk mendapatkan semula kerugian (lihat perenggan 80–82 & 86).]

Cases referred to

Addiscombe Garden Estates Ltd and Anor v Crabbe and Ors [1958] 1 QB 513, CA (refd)
Goh Gin Chye & Anor v Peck Teck Tian Realty Pte Ltd & Anor [1987] 2 MLJ 118; [1987] 1 LNS 33, CA (refd)
Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9; [1979] 1 LNS 60, FC (refd)
Suu Lin Chong v Lee Yaw Seang [1979] 2 MLJ 48 (folld)
Triple Zest Trading & Suppliers & Ors v Applied Business Technologies Sdn Bhd [2023] 6 MLJ 818; [2023] 10 CLJ 187, FC (folld)

Legislation referred to

Contracts Act 1950 ss 24, 24(a), (b), (e), 66
Evidence Act 1950 ss 101(1), (2), 102
Moneylenders Act 1951 ss 2, 5(1), (2), 15, 10OA

Appeal from: *Tan Sri Dato Seri Dr M Mahadevan a/l Mahalingam v David Choong Jin Chai & Anor and another case* [2021] MLJU 2820 (High Court, Kuala Lumpur)
Editorial Note: The respondents in this case filed for leave applications in the Federal Court through Civil Application Nos 08(f)-421–12 of 2023(W) and 08(f)-424–12 of 2023(W), where the applications for leave to appeal were dismissed.

Joseph Yeo (Joseph Yeo) in Civil Appeal No W-02(NCvC)(W)-2021–10 of 2021 for the appellant.
David Hoh (with Cassandra Choo) (Lim & Hoh) in Civil Appeal Nos W-02(NCVC)(W)-2155–11 of 2021 and W-02(NCvC)(W)-2156–11 of 2021 for the appellant.
Sivanesan Nadarajah (with Leong Pei Xin) (Vicknaraj, RD Ratnam Rajesh Kumar & Assoc) in Civil Appeal Nos W-02(NCvC)(W)-2021–10 of 2021 and W-02(NCvC)(W)-2156–11 of 2021 for the respondent.
Sivanesan Nadarajah (with Leong Pei Xin) (Vicknaraj, RD Ratnam Rajesh Kumar & Assoc) in Civil Appeal No W-02(NCVC)(W)-2155–11 of 2021 for the first respondent.
Hafizah Johor bt Ariff Johor (Malaysian Department of Insolvency) in Civil Appeal No W-02(NCVC)(W)-2155–11 of 2021 for the second respondent.

Azizah Nawawi JCA:

INTRODUCTION

[1] There are three appeals before us arising from two separate suits.

[2] In Civil Suit No 22NCVC-479–09 of 2015 ('Suit 2015'), David

A Choong ('DC') had sued Tan Sri Dato' Seri Dr M Mahadevan a/I Mahalingam ('TSM') and nine others seeking, inter alia, a declaration that TSM had illegally loaned monies to DC in ten transactions which are unlawful and unenforceable under the Moneylenders Act 1951 ('the MLA').

B **[3]** In Civil Suit No 22NCVC-95–02 of 2017 ('Suit 2017'), TSM had sued DC and Lee Kuang Gen ('LKG') for collusion by way of inducement, misrepresentation and false promises of handsome returns of gold investments, and causing TSM to enter into the sale of gold agreements ('SOGAs') with DC amounting to RM10,493,500. TSM's claim is for the return of the said sum of
C RM10,493,500.

[4] DC filed a counterclaim in Suit 2017 seeking a declaration that all of TSM's ten loans to DC are in contravention of the MLA and are therefore
D illegal and/or void ab initio, an injunction to restrain TSM and his servants and agents from harassing, assaulting, threatening or committing any act to injure DC and his businesses and for general damages.

[5] After a full trial, the learned judge has allowed Suit 2017. LKG had filed
E an appeal in Appeal No W-02(NCvC)(W)- 2021–10 of 2021 ('Appeal 2021') and Appeal No W-02(NCvC)(W)-2155–11 of 2021 ('Appeal 2155') was filed by DC.

F **[6]** The learned judge had also dismissed Suit 2015, and this is the subject matter of Appeal No W-02(NCvC)(W)-2156–11 of 2021 ('Appeal 2156') by DC.

THE SALIENT FACTS

G **[7]** In or about July 2013, LKG had introduced DC to TSM for the sale of gold bars by TSM. In respect of these transactions, the gold bars were sold and the proceeds of the sale were deposited into the bank account of the TSM.

H **[8]** Between November 2013 to January 2015, TSM had entered into the following SOGAs with DC to sell/invest in gold ingots to the value of RM10,993,500. TSM's position is that he had transferred the gold to the said value to DC based on the following agreements:

I (a) SOGA 1 dated 17 November 2013;

(b) SOGA 2 dated 25 June 2014;

(c) SOGA 3 dated 25 June 2014; and

(d) SOGA 4 dated 9 January 2015.

[9] The said SOGAs are the subject matter of both suits. A

[10] Parties have also signed four documents, titled 'Letter Verifying and Confirming Transfer of Gold Bullions' (exhs D5, D44 and D45). These documents are to show that the gold bullion was transferred to DC, who is described as the purchaser, from TSM, who is described as the vendor. B

[11] In early 2015, TSM had requested that DC return the sum of RM2,000,000 and USD2,000,000. C

[12] By a letter dated 20 April 2015, TSM requested DC to pay the sum of RM10,043,500. DC did not make the payment.

[13] On 2 September 2015, DC filed Suit 2015. D

[14] On 21 February 2017, TSM Suit 2017.

DECISION OF THE HIGH COURT

[15] The core issue before the learned High Court judge was whether the SOGAs entered between DC and TSM are for the sale of the gold bullions or disguised transactions of moneylending. E

[16] Before the learned judge, DC took the position that the loan agreements were disguised as the SOGA, but were essentially moneylending arrangements, where the loan was portrayed as an investment and the interests as dividends. On the contrary, TSM contends that the transactions between him and DC did not involve moneylending transactions but investments of gold and are therefore not prohibited by the MLA. F G

[17] Having considered the evidence, the learned judge made a finding that there was a clear admission of indebtedness towards a settlement by DC to TSM. The undisputed sequence of events culminating in the sale of the gold are consistent with the fact that the gold transactions are actually agreements for the sale of gold. The learned judge also held that the evidence clearly shows that both DC and LKG were from the outset, and were at all material times, fully aware that the agreements were for the sale of gold. H

[18] The learned judge also made a finding that DC had failed to prove on the balance of probabilities that TSM had carried on a moneylending business. As such, the learned judge held that ss 5(1) and 15 of the MLA do not apply to the gold transactions under the SOGAs. I

[19] As against LKG, the learned judge held that the indemnity letter dated 2 July 2015 was signed by LKG voluntarily and that the terms of the indemnity letter are valid and enforceable against him. In the said indemnity letter, LKG had explicitly committed to indemnify TSM 'completely against all repercussions and liabilities, regardless of their nature, directly stemming from or connected to the mentioned investment', that is, the gold investment.

OUR DECISION

[20] The only issue before us is whether the transacted sum of RM10,043,500 was pursuant to the SOGAs or was it a disguise for moneylending and is therefore subject to the provisions of the MLA.

Whether the SOGAs were genuine agreements for the sale of the gold

SOGA 1 dated 17 November 2014

[21] The terms in the SOGAs, between TSM as the vendor, and DC as the purchaser for the sale of the gold, inter alia, are as follows (see SOGA 1 dated 17 November 2014):

> SALE OF GOLD
>
> An Agreement made this 17th November 2014 Between M Mahadevan a/l Mahalingam (I/C No 290909–14–5467) (hereinafter called the Vendor) on the one part and David Choong Jin Chai (I/C No 831111–14–6369) of No 27, Jalan Setiabakti 8, Bukit Damansara, 50490 Kuala Lumpur (hereinafter called the Purchaser) on the other part.
>
> WHEREAS
>
> A. The Vendor is the proprietor/owner of gold products of 99.99% which shall be ninety nine point ninety nine percent (99.99%) gold purity (the 'said Gold').
>
> B. The Vendor is desirous of selling the said Gold to the Purchaser and the Purchaser has agreed to purchase the same on terms and conditions hereinafter set forth.
>
> NOW IT IS HEREBY AGREED as follows:
>
> 1. In consideration of the sum of Ringgit Malaysia One Only (RM1) now paid by the Purchaser to the Vendor, the receipt whereof the Vendor hereby acknowledges, the Vendor hereby agrees to sell the said Gold at a below table (hereinafter referred to as the Purchase Price).
> 2. The balance of the Purchase Price as per below table shall be payable by the Purchaser to the Vendor on or before 5 Dec 2014 (Completion Date)
> 3.

Tranche	Period	Maturity	Gold	Gold Price	Amount invest	Dividend
1.	17/5/2014	17/6/2014	1kg		130,000	975
2.	27/5/2014	27/6/2014	7kg		945,000	7087.5
3.	20/5/2014	28/6/2014	3kg		420,000	3150
4.	2/5/2014	2/6/2014	3kg		420,000	3150
5.	1/5/2014	1/6/2014	1kg		130,000	975
6.	5/5/2014	5/6/2014	1.5kg		202,500	1518.75

4. Upon payment of the balance of the Purchase Price by the Purchaser to the Vendor within the stipulated period by cash or bankers draft, the Vendor shall deliver the said Gold to the Purchaser.

5. ...

[22] TSM had explained that the sale of gold transactions under the SOGAs to be as follows:

(a) the gold transaction is carried out whereby DC takes possession of the gold belonging to TSM and enters into the SOGA for the purchase of the gold;

(b) the purchase price for the gold to be paid by DC to TSM is fixed at the date of the agreement, but the purchase price is to be paid at a future date; and

(c) pending the payment of the full purchase price, DC is to pay a fixed sum calculated on the purchase price and this fixed sum is paid to TSM on a monthly basis until the completion of the sale, when the full purchase price of the gold is paid to TSM on the date stated in the agreement.

[23] Therefore, from the evidence in chief of TSM, DC is supposed to pay for the gold transactions under SOGA 1 to TSM at a fixed sum on a monthly basis until the full purchase price is paid.

[24] However, learned counsel for the appellant/DC took the position that Tranche 1 to Tranche 6 of SOGA 1 are not investments, but are cash loans given by TSM to DC whilst the dividends are actually interests over the said loans which DC had to pay.

[25] DC had submitted that from August 2013 to September 2013, TSM had continuously loaned cash monies to DC on 6 occasions totalling RM2,247,500 with interest charged for each and paid by DC to TSM. These cash loans are as follows:

(a) 17 September 2013, TSM remitted from his Ambank Account into DC's MBB Account No 514730104186 the principal cash sum of RM130,000 as a cash loan (see exh D17/encl 12/pdf pg 157) (cash loan 1);

(b) on 27 August 2013, TSM remitted from his Ambank Account into DC's MBB Account No 514721053886 the principal cash sum of RM945,000 as a loan (see exh D-18/encl 12/pdf pg 155) (cash loan 2);

(c) on 28 August 2013, TSM remitted from his Ambank Account into DC's MBB Account No 514721053886 the principal cash sum of RM420,000 as a loan (cash loan 3);

(d) on 30 August 2013, TSM remitted from his Ambank Account into DC's MBB Account No 514721053886 the principal cash sum of RM420,000 as a loan (cash loan 4);

(e) on 30 September 2013, TSM remitted from his Ambank Account into DC's MBB Account No 514730104186 the principal sum of RM130,000 as a loan (see exh D19/encl 12/pdf pg 158) (cash loan 5); and

(f) on 5 September 2013, TSM remitted from his Ambank Account into DC's MBB Account No 514730104186 the principal sum of RM202,500 as a loan (see exh D20/encl 12/pdf pg 156) (cash loan 6).

[26] The total six principal cash loans stated above amount to RM2,247,500 broken down as follows:

1.	Cash Loan 1 =	RM 130,000
2.	Cash Loan 2 =	RM 945,000
3.	Cash Loan 3 =	RM 420,000
4.	Cash Loan 4 =	RM 420,000
5.	Cash Loan 5 =	RM 130,000
6.	Cash Loan 6 =	RM 2,022,500
		RM2,247,500

[27] It is to be noted that the cash loans 1–6, corresponds with the amount invested in Tranche 1–6 of SOGA 1.

[28] We are of the considered opinion and we agree with the appellant/DC that the above cash loans 1–6, which are Tranche 1 to 6 of SOGA 1, are transfers of cash from TSM to DC, and these are supported by the bank documents, in the form of Remittance Form, TSM Bank Statement and DC's bank statements.

[29] For *cash loan 1*, the said loan is supported by the following documents

to show the transaction of RM130,000 from TSM to DC:

(a) TSM's Ambank TT Remittance Application Form (dated 17 September 2013). This form is evidence of the transfer of RM130,000 from TSM to DC. This form was signed by TSM as the applicant to transfer the said sum to the beneficiary, DC;

(b) TSM's Ambank 2013 statement (showing 17 September 2013 debit entry of RM130,000). TSM's 2013 bank statement from Ambank clearly records a debit entry of RM130,000 on 17 September 2013, to correspond to the transfer to DC's account; and

(c) DC Maybank 2013 statement (showing 17 September 2013 credit entry of RM130,000). DC's September 2013 bank statement from Maybank has confirmed the credit entry of RM130,000 on 17 September 2013, which confirmed the transaction. This credit entry in the Maybank statement confirms that the funds were successfully received by DC from TSM.

[30] For *cash loan 2*, TSM's Ambank TT Remittance Application Form (dated 27 August 2013) evidences a transfer of RM945,004 (including a RM4 fee) from TSM to DC, signed by TSM as the transfer applicant. This transfer is supported by TSM's Ambank 2013 statement, which shows a debit entry of RM945,000 on 27 August 2013, matching the transfer to DC's account. Added to that, DC's Maybank 2013 statement confirms the RM945,000 credit entry on 27 August 2013, verifying the successful receipt of funds from TSM.

[31] For *cash loan 3*, TSM's Ambank TT Remittance Application Form (dated 28 August 2013) evidences a transfer of RM420,004 (including a RM4 fee) from TSM to DC, signed by TSM as the transfer applicant. This transfer is supported by TSM's Ambank 2013 statement, which shows a debit entry of RM420,000 on 28 August 2013, matching the transfer to DC's account. Added to that, DC's Maybank 2013 statement confirms the RM420,000 credit entry on 28 August 2013, verifying the successful receipt of funds from TSM.

[32] For *cash loan 4*, TSM's Ambank TT Remittance Application Form (dated 30 August 2013) evidences a transfer of RM420,004 (including a RM4 fee) from TSM to DC, signed by TSM as the transfer applicant. This transfer is supported by TSM's Ambank 2013 statement, which shows a debit entry of RM420,000 on 30 August 2013, matching the transfer to DC's account. Added to that, DC's Maybank 2013 statement confirms the RM420,000 credit entry on 30 August 2013, verifying the successful receipt of funds from TSM.

[33] For *cash loan 5*, TSM's Ambank TT Remittance Application Form (dated 30 September 2013) evidences a transfer of RM130,004 (including a RM4 fee) from TSM to DC, signed by TSM as the transfer applicant. This transfer is supported by TSM's Ambank 2013 statement, which shows a debit entry of RM130,000 on 30 September 2013, matching the transfer to DC's account. Added to that, DC's Maybank 2013 statement confirms the RM130,000 credit entry on 30 September 2013, verifying the successful receipt of funds from TSM.

[34] For *cash loan 6,* TSM's Ambank TT Remittance Application Form (dated 5 September 2013) evidences a transfer of RM202,504 (including a RM4 fee) from TSM to DC, signed by TSM as the transfer applicant. This transfer is supported by TSM's Ambank 2013 statement, which shows a debit entry of RM202,500 on 5 September 2013, matching the transfer to DC's account. Added to that, DC's Maybank 2013 statement confirms the RM202,500 credit entry on 5 September 2013, verifying the successful receipt of funds from TSM.

[35] In summary, from the combination of these documents, TSM's Ambank TT Remittance Application Form, TSM's Ambank 2013 statement and DC's Maybank 2013 statement, have provided comprehensive evidence of the six Cash Loan transactions, remitted by TSM to DC.

[36] The flow of the money, the six Cash Loan transactions, is not from DC to TSM to pay for the gold, but are cash transaction remitted by TSM to DC as captured by the bank documents.

[37] In other words, we find that there is inconsistency in the financial transactions and their alignment with the purported nature of the agreement. If TSM is indeed the seller of gold to DC, the conventional business practice would dictate that the buyer, DC, should be the one transferring funds to the seller, TSM. The reversal of this financial flow in this case raises doubts on the authenticity and credibility of TSM's claim that these are the claimed 'sale of gold' transactions.

[38] Having considered the appeal record, we find that TSM's testimony under cross-examination during the trial shows that that he had failed to provide an explanation as to why he transferred money to DC and his general answer was that, LKG, his fund manager would be able to explain:

> DH: I put to you that, these 4 payments were made to your account and 2 payments were made on 26th July 2013 for the sum of RM900,000 as well as RM30,000 respectively on this date. And also on 29th July 2013, both funds equal to the balance part payment for 2208, 2 million and 208 thousands just for the record. My lady. I put that.

PW1: Yang Arif.

PW1: Yang Arif, so many payments were also made. Yang Arif. This is only isolated. *I can't tell. Only my fund manager will be able to tell. He's the one*. I wonder who pick this thing. These are my personal accounts. I didn't mark on them.

DH: Tan Sri, we are not going on about this anymore. We will talk to your fund manager when he comes.

PW1: *Yes, he will be able to answer, the other payments are there. I don't know,* so many why are these. Are these only a pickup. I don't know. So many payments are there. I didn't. Its my own account. How did it go. *My fund manager would be able to tell.* Who pick it up? That is not from me. I didn't get this account. Yang Arif, I didn't point out this one … (RR/encl 6/pg 75–76).

…

PW1: … I can't see other payments. Everything, who gave this statement. *I wouldn't know Yang Arif. The only man who can answer is my fund manager, fund manager*. There are only two isolated items here that I can see. I won't know. Only he would be able to answer. He is the man who manages. He takes the gold and he pays. No money he doesn't get the gold. That's it. That's all I know. He does it …. (RR/encl 6/pg 78–79)

[39] Added to that, TSM had given evidence that his fund manager, LKG, would know the details. In his evidence LKG had confirmed that he had prepared the six Ambank TT Remittance Form based on TSM's instruction to transfer the six principal Cash Loan sums to DC. LKG had affirmed that because TSM had signed the TT Remittance Forms, TSM knew that these six principals cash sums were in fact cash money loans to DC with interest, and they were not for sale of gold bars. Under cross-examination, LKG gave the following evidence:

DH: Alright now after, you would agree with me that after the first 2 real sale of gold transactions. Then what happen? Would you agree with me that Tan Sri then over a period on 17th October 2013 to 5th November 2013, I am looking at page 82, the first table.

DW3: Yes Yang Arif.

DH: Alright. *Would you agree with me that Tan Sri had lent cash money to DC? For that period in the table. 6 loans. Over that period to David Choong.*

DW3: *Yes Yang Arif.*

DH: Now, and *you would agree with me that the loans that was lent, the actual money were under the amount invest column.* There is a column there … There are figures there, right as you look there are 6 figures Tranche 1, 2, 3, 4, 5, 6 there's correspondingly the amounts invested are for the first loan of RM130,000, second loan RM945,000, third loan RM420,000, fourth loan RM20,000, fifth loan RM130,000 and sixth RM202,500 right?

DW3: *Yes Yang Arif.*

DH: So you would agree with me that *these were actually the Cash Loan amounts that Tan Sri had loan to David Choong?*

DW3: *Yes Yang Arif.*

DH: Now *the last column under the label dividend,* what was that?

DW3: That *was the interest that David Choong have to pay Tan Sri every month Yang Arif* (see RR/encl 11/pg 16–18).

...

DW3: ... As you can see that in Tranche 1 that under dividend, the interest paid was RM975 have to be times 12 months and is equivalent to 9% for each transaction the loans that have been given.

...

DH: Alright and there are figures here. *Was there any real gold that was transacted in regards to the 6 transactions in these documents?*

DW3: *No Yang Arif.* (see RR/encl 11/pg 16–17).

[40] On the issue of the 'dividends' in SOGA 1, DC took the position that these are not real dividends, but are interests charged on cash loans 1–6, by TSM at the rate of 9%. This was supported by LKG, who had also confirmed that the six dividends stated in SOGA 1 were in fact interest payable for the six cash loans, as can be seen from the evidence above.

[41] The monthly interests which tally with the figures on dividends in SOGA 1 are as follows:

Loan	Amount	9% pa	Monthly payment
Cash Loan 1	RM130,000	RM11,700	RM975
Cash Loan 2	RM945,000	RM85,050	RM7,087.50
Cash Loan 3	RM420,000	RM37,800	RM3,150
Cash Loan 4	RM420,000	RM37,800	RM3,150
Cash Loan 5	RM130,000	RM11,700	RM975
Cash Loan 6	RM202,500	RM18,225	RM1,518.75

[42] DC had also given evidence that he had paid to TSM monthly interest at a rate of 9%pa for each transaction, totalling RM300,908.25. These payments are evidenced by the bank statements of DC's account.

[43] Since Tranche 1 to Tranche 6 of SOGA 1 are cash remitted by TSM to DC, they are cash loans given by TSM to DC, disguised as sale of gold transactions.

[44] We are of the considered opinion that the learned judge was plainly wrong in her finding that SOGA 1 is purely a sale and purchase of gold. The learned judge failed to consider the banking documents which show the remittance of cash from TSM to DC, which corresponds with the 'Amount Invest' in SOGA 1 and the 'dividends' were actually interest of 9%pa on the respective cash loans.

[45] It is trite law that the court does not look at labels attached to a document but will examine the contents of the same in its particular circumstances to determine the true relationship between the parties and the type of transaction that they have entered into.

[46] In *Goh Gin Chye & Anor v Peck Teck Tian Realty Pte Ltd & Anor* [1987] 2 MLJ 118; [1987] 1 LNS 33, the Singapore Court of Appeal had applied the English case of *Addiscombe Garden Estates Ltd and Anor v Crabbe and Ors* [1958] 1 QB 513 where the plaintiffs had expressly by a written agreement purported to 'license and authorise' the defendants to use and enjoy certain premises and amenities therein for a term of two years in consideration of a payment of certain fees. The Court of Appeal in England, upon a detailed examination of the agreement, came to the conclusion that a tenancy was created, notwithstanding that the document was described by the parties as a licence and the draftsman had 'studiously and successfully avoided' the use either of the word 'landlord' or the word 'tenant' throughout the document. Jenkins LJ said at p 522:

> As to the first question? whether the so-called licence of April 12, 1954, in fact amounted to a tenancy agreement under which the premises were let to the trustees? the principles applicable in resolving a question of this sort are, I apprehend, these. *It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence.*

And he later said, at p 528:

> The present case, of course, has nothing to do with the Rent Acts, but *the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not* necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties. (Emphasis added.)

[47] Based on the banking documents that TSM had transferred cash loans to DC rather than gold bars, it can be concluded that SOGA 1 neither

substantiates nor serves as evidence for the existence of six gold sale transactions. Consequently, we find that SOGA 1 is a sham document and does not represent a valid sale and purchase of gold.

[48] The next issue is whether the six cash loans are caught by the MLA. The purpose of the MLA is to regulate the business of moneylending and not to regulate all kinds of moneylending transactions. sub-ss 5(1) and (2) of the MLA prohibit unlicensed moneylending business and certain acts related thereto. The MLA does not prohibit any moneylending transaction with interest unless the lender has carried on an unlicensed moneylending business. In *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9; [1979] 1 LNS 60, the Federal Court held as follows:

> At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to moneylending but only to Moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court. We make this simple and obvious observation because it was canvassed very strongly before us by counsel for the appellants that since the transactions between the respondents and the client are moneylending transactions, the respondents must be a moneylender and the guarantee which the appellants signed is therefore unenforceable. This submission overlooks the fact that the party to a transaction who thereby becomes the creditor may or may not be a moneylender. *He is a moneylender if within the meaning of s 2 of the Ordinance he can be said to be a person 'whose business is that of moneylending'. To prove business requires some sort of continuity or system or repetition of similar transactions.* (*Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] MLJ 74; [1962] AC 209; [1960] 1 LNS 17). (Emphasis added.)

[49] In *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd*, the court held that to prove moneylending within the ambit of the MLA, 'requires some sort of continuity or system or repetition of similar transactions'. However, the new provision in s 10OA of the MLA (which came into force on 15 April 2011 vide Act A1390) provides that in any proceedings against any person where it is alleged that such person is a moneylender, proof of a single loan at interest made by such person shall raise a rebuttable presumption that such person is carrying on the business of moneylending. Section 10OA reads as follows:

> 10OA Presumption as to the business of moneylending
>
> Where in any proceedings against any person, it is alleged that such person is a moneylender, *the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved.* (Emphasis added.)

[50] Section 10OA is a rebuttable presumption, a legal principle that

presumes something to be true unless proven otherwise. s 10OA of the MLA imposed on TSM the legal burden of proving, on the balance of probabilities, that he was not carrying on the business of 'moneylending' when he lent the six cash loans, which carried interests, to DC. The presumption is that TSM was carrying on the business of moneylending, 'until the contrary is proved'.

[51] In the present appeal, we are of the considered opinion that a rebuttable presumption that TSM had carried on a moneylending business by granting six cash loans to DC without a moneylender's license has arisen pursuant to s 10OA of the MLA. The rebuttable presumption arises because there are undisputed contemporaneous documents in the form of the TSM remittance forms, TSM bank statements and DC bank statements which proved that DC had obtained the loans and paid interest at 9%pa to TSM.

[52] To successfully rebut the presumption under s 10OA of the MLA, TSM must prove on the balance of probabilities that by entering into the six loan transactions with DC, he was not engaging in an act of 'lending of money at interest, with or without security, by a moneylender to a borrower', within the meaning of 'moneylending' by s 2 of the MLA. Having considered the decision of the learned judge, we find that she had failed to consider the application of s 10OA of the MLA. On our part, and having considered the evidence, we agree with DC that TSM has failed to rebut the presumption under s 10OA of the MLA.

[53] Therefore, we are of the considered opinion that DC had discharged the legal and evidential burden under s 101(1), (2) and 102 of the Evidence Act 1950 to prove on the balance of probabilities that TSM had carried on a moneylending business contrary to sub-s 5(1) of the MLA by making the six cash loans subject to the payment of interests, to DC and the same was camouflaged as a sale of gold bars by way of SOGA 1.

[54] In view of the fact that the six cash loans, which are subject to the payment of interests, granted by the TSM to DC are in contravention of sub-s 5(1) of the MLA, the said loans are void and unenforceable under s 15 of the MLA, which provides:

> 15 Contract by unlicensed moneylender unenforceable
>
> No moneylending agreement in respect of money lent after the coming into force of [MA] by an unlicensed moneylender shall be enforceable.

[55] Added to that, when an agreement is found to be illegal, it is also void under s 24 of the Contracts Act 1950, which provides that an agreement is void if the object or consideration of the agreement is unlawful. The section reads as follows:

A 24 What considerations and objects are lawful, and what not

The consideration or object of an agreement is lawful unless:

(a) it is forbidden by law;

B (b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

C In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[56] The six cash loans subject to the payment of interests in the present D appeal would be caught by paras (a), (b) and (e) of s 24 of the Contracts Act. The court will not render assistance to TSM in seeking to enforce such transactions and recover the monies as the remedy of restitution under s 66 of the Contracts Act will not avail to him.

E *SOGA 2 dated 25 June 2014*

Tranche	Period	Maturity	Gold	Gold Price	Amount invest	Dividend
1.	17/5/2014	17/6/2014	1kg		130,000	975
2.	27/5/2014	27/6/2014	7kg		945,000	7087.5
F 3.	20/5/2014	28/6/2014	3kg		420,000	3150
4.	2/5/2014	2/6/2014	3kg		420,000	3150
5.	1/5/2014	1/6/2014	1kg		130,000	975
6.	5/5/2014	5/6/2014	1.5kg		202,500	1518.75
G 7.	5/5/2014	5/6/2014	17.375kg		2,405,000	20,041
8.	16/6/2014	16/7/2014	14kg		Loan	14,000
9.	26/6/2014	27/7/2014	20kg		Loan	18,000

[57] The Table in SOGA 1 was used in SOGA 2, SOGA 3 and SOGA 4. In H his evidence, LKG stated that after the parties had entered SOGA 1, TSM had instructed LKG to re-record the said loans in the subsequent SOGA 2, SOGA 3 and SOGA 4. Therefore, as can be seen from SOGA 2, SOGA 3 and SOGA 4, the same Tranche 1–6 or cash loans 1–6, are all recorded therein.

I **[58]** In respect of SOGA 2, all the six Tranches/loans described in SOGA 1 are recorded with changes to the dates in the 'period' and 'maturity' columns. In respect of these six Tranches, we are of the considered opinion they are the same as in SOGA 1, and therefore they are cash loans from TSM to DC with interest at 9%pa. Based on the reasons enumerated above, we find that these six

cash loans are in contravention of sub-s 5(1) of the MLA and are therefore void under s 15 of the MLA.

[59] In respect of Tranche 7, 8 and 9 of SOGA 2, DC submitted as follows:

Tranche 7

[60] On 6 March 2014, TSM extended a Cash Loan of RM2,405,000 to DC by transferring 17.375g of physical gold bars, which were then converted into a fixed Cash Loan. This loan was subject to a monthly interest payment of RM20,041 by DC to TSM (at 10% pa) ('monetised loan 7').

[61] Between 8 April 2013 and 11 March 2015, DC made a total interest payment of RM240,492 (RM20,041 x 12 months) to TSM.

Tranche 8

[62] On 18 November 2013, TSM transferred 14 kg to DC (8kg gold bars plus the balance 6kg) subject to monthly interest of RM14,000. Between 16 February 2013 to 28 December 2014, DC has paid to TSM the total interest of RM182,000 (RM14,000 x 13 months) on the loan of 14kg gold bars.

[63] On 16 December 2014, TSM monetised and converted the loan of 14kg gold bars into a fixed cash ringgit loan of RM1,806,000, subject to monthly interest of RM15,050 (at 10% pa). Between 21 January 2015–18 March 2015, DC had paid to TSM the total interest of RM45,150 (RM15,050 x 3 months) on the monetised loan of RM 1,806,000 ('monetised loan 8').

Tranche 9

[64] On 26 June 2014, TSM loaned to DC 20kg physical gold bars subject to monthly interest of RM18,000 (20kg gold bars). Between 5 August 2014–9 January 2014, DC has paid to TSM the total interest of RM108,000 (RM18,000 x 6 months) on the loan of 20kg gold bars.

[65] On 26 December 2014, TSM had monetised and converted the 20kg gold bars Loan into a fixed Ringgit cash loan of RM2,660,000 subject to payment of monthly interest of RM20,166 (10%pa). From 6 February 2015 to 30 May 2015, DC had paid to TSM the total interest of RM60,498 (RM20,166 x 3 months) on the monetised loan ('monetised loan 9').

[66] For Tranche 7, 8 and 9, there was a transfer of gold from TSM to DC, but these were subsequently monetised into cash loans with monthly repayments subject to 10% interest. DC gave evidence that he has paid to TSM monthly interest at a rate of 9–10%pa for each transaction, totalling to RM636,140, and summarised as follows:

(a) interest paid for monetised loan 7 = RM240,492;

(b) interest paid for monetised loan 8 = RM227,150; and

(c) interest paid for monetised loan 9 = RM168,498.

[67] We are of the considered opinion that DC had established the monthly interest payment to TSM for each monetised loans 7–9, as can be seen from DC's bank statements.

[68] DC's evidence was supported by TSM's fund manager, LKG who gave the following evidence:

> DH: Alright, can you explain Tranche 7, 8 and 9 for me? Meaning oh sorry, is it a record of loans also?
>
> DW3: Just a record of loans, Yang Arif, can I start explain Yang Arif?
>
> DH: Yes you can.
>
> DW3: Okay Yang Arif. You see *the Tranche No 7 is actually a gold bar that pass from Tan Sri to David Choong but these gold bars is actually monetised … So actually 17.375 was monetised in the loan amount*. So that is why we come to about 250,500 and David Choong have to pay the interest, money interest in table Tranche 7.
>
> ...
>
> DW3: Yes, the gold bars actually taken from Damansara Perdana and monetised it. *Straight away that means I give you gold bar you just calculate it as a loan amount*. So that is why it comes to over 2.4 over millions.
>
> DH: And how *much was the interest* to be paid in this 2.4 million?
>
> DW3: Look at the table *RM20,041 if you count 10%, 9 to 10%* Yang Arif.
>
> *DH: This is per month.* (see RR/encl 11/pg 20–21).

[69] Therefore, as these gold transactions have been monetised into cash loans and bearing interests, these transactions are also caught by the MLA and are therefore void.

SOGA 3 dated 25 June 2014

Tranche	Period	Maturity	Gold	Gold price	Amount Invest	Dividend

1	17/5/2014	17/6/2015	1kq		130000	975
2	27/5/2014	27/6/2015	7kg		945000	7087.50
3	28/5/2014	28/6/2015	3kq		420000	3150
4	2/5/2014	2/6/2015	3kg		420000	3150
5	1/5/2014	1/6/2015	1kg		130000	975
6	5/5/2014	5/6/2015	1.5kg		202500	1518.75
7	5/5/2014	5/6/2015	17.375kg		2405000	20041
8	16/6/2014	16/7/2015	14kg		Loan	14000
9	26/6/2014	27/7/2015	20kg		Loan	18000
10	18/11/2014	8/6/2015	22kg	122	1875000	15625
11				128	941000	No dividend

[70] In respect of SOGA 3, Tranche 1–9 are reproductions of SOGA 1 and SOGA 2. For the reasons enumerated above, we find that all the nine transactions are cash loans disguised as sale and purchase of gold, and are therefore void under the MLA.

Tranche 10

[71] DC had purchased a portion of this 22kg gold to the value of RM941,000 and paid TSM the same in two instalments of RM491,000 and RM450,000 on 18 November 2014 and 31 December 2014 respectively. These two payments can be seen from DC's December 2014 Maybank statement account showing a debit entry of RM491,000 on 18 December 2014 and a debit entry of RM450,000 on 31 December 2014.

[72] These payments are corroborated by TSM's December 2014 Ambank statement showing credit entry of RM491,000 on 18 December 2014 and a credit entry of RM450,000 on 21 December 2014. This shows that TSM had received the sum of RM941,000 from DC.

[73] The balance monetised sum of RM1,875,000 (RM2,816,000 minus RM941,000) continued to be loaned to DC subject to monthly interest of RM14,125 (interest rate of 9%pa on RM1,875,000) ('monetised loan 10'). For Loan 10, from 28 December 2013–18 March 2015, DC had paid to TSM the total interest of RM56,560. The evidence of the payment of the interest is supported by the bank statements of DC.

[74] The above evidence is supported by the oral evidence of LKG:

DH: Alright, now you explained 9, can you explain item 10 and 11?

DW3: ... *Actually number 10 and 11 is to record 22 kg of gold bars passed to David Choong* at that time, towards end on 2014. Therefore the 22 kg, because *Tan Sri wants to sell at the price of RM128,* meanwhile at that moment, price was still RM122. *Then once it hits 128, Tan Sri want to monetize whole bunch of gold. Monetize it.* So how come it come to 941? *Because the item under no 11, RM941000 actually Tan Sri wants to cash out to give to someone*. So the loan left of RM1.8m 78 thousand to keep for David Choong. Still in the loan. 941 Tan Sri want to cash to give to someone then the balance 187 thousands keep as a loan.

...

DH: So *Tan Sri had 22 kg of gold. What he wanted to do is to sell at RM128 per gram.*

DW3: *Yes Yang Arif.*

...

DH: The total is 1 million 875 thousand plus 941 thousand. How much is that? *So the total is RM2 million 816 thousands*, correct?

DW3: *Yes Yang Arif.*

DH: *Of which then he took 941 thousands for himself and he loaned David Choong RM1.875 million?*

DW3: *Yes Yang Arif.*

DH: And for *that 1.875 million he charged interest amount of RM15,625 correct?*

DW3: *Yes correct.* (see RR/encl 11/pages 23–24).

Tranche 11

[75] With regards to Tranche 11, this was subsequently omitted from SOGA 4 because this sum was taken by TSM himself as can be seen from the above evidence of LKG.

SOGA 4 dated 25 June 2014

[76] SOGA 4 is a restatement of SOGA 1 to SOGA 3, without Tranche 11 and shows a total investment of RM6,341,000.

Tranche	Period	Maturity	Gold	Gold Price	Amount invest	Dividend
1	17/1/2015	17/6/2015	1kg		130000	975
2	27/1/2015	27/6/2015	7kg		945000	7087.5
3	28/1/2015	2/6/2015	3kg		420000	3150
4	2/1/2015	2/6/2015	3kg		420000	3150
5	1/1/2015	1/6/2015	1kg		130000	975
6	5/1/2015	5/6/2015	1.5kg		202500	1518.75

7	5/1/2015	5/6/2015			2405000	20041
				Total	4652500	36897.25
8	18/1/2015	18/6/2015		128	1875000	14125
9	17/1/2015	17/6/2015	14kg	129	1806000	15050
10	26/1/2015	26/6/2015	20kg	133	2660000	20166
				Total	6341000	49341

[77] For the reasons enumerated above, we are also of the considered opinion that SOGA 4, which is a restatement of SOGA 1 to SOGA 3, is a moneylending business, which is contrary to sub-s 5(1) of the MLA. The said loans were camouflaged by way of the SOGA 1 to SOGA 3 and were in truth loans by TSM to DC, repayable with interest.

Issues raised by the court

[78] On 15 December 2022, this court directed the parties to submit on the following issues:

(i) the legal definition of 'Money';

(ii) if gold is given in physical form and value determined or to be determined at a later date together with a return of investment or dividend or interest, or given by way of a loan, whether it is contrary to the MLA; and

(iii) if a transaction is contrary to the MLA, can the alleged borrower after his unequivocal admission of the debt, raise the issue of illegality to escape the obligation to repay the amount outstanding.

[79] With regards to issue (i), it is common ground that 'Money' is not defined in the MLA. Therefore, 'money' must be given its dictionary meaning. In *Black's Law Dictionary*, 7th Ed (1999), money is defined as:

> Medium of exchange authorized or adopted by a government as part of its currency ... assets that can be easily converted to cash ...

[80] In view of the above definition of money, that is, it is a medium of exchange that can be easily converted to cash, we find that the definition of money is wide enough to encompass not only traditional forms of currency but also assets that can be readily converted into cash. This will definitely include gold and cryptocurrencies.

[81] On issue (ii), we are of the considered opinion that from the factual matrix of this case, Tranche 7–10 were initially in the form of gold bars. However, subsequently the parties agreed that these transactions be converted

into cash values (principal loan sum) with interest payments paid on the principal loan sum. Therefore, since the gold bars have been converted into cash (monetised) form, then these money loans are caught under the MLA.

[82] Added to that, in his letter dated 20 April 2015, TSM had made express reference to a 'loan' of RM10,043,500 and there was no demand for the return of the gold. As such, we agree with DC that the act of TSM demanding DC to repay the money clearly shows that he did not sell gold to DC.

[83] With regards to issue (iii), in the case of *Suu Lin Chong v Lee Yaw Seang* [1979] 2 MLJ 48, despite there being an admission of monies owed, the court held that as the moneylending transaction was illegal and void ab initio, and the court should not allow restitution.

[84] Recently, the same matter was raised in the case of *Triple Zest Trading & Suppliers & Ors v Applied Business Technologies Sdn Bhd* [2023] 6 MLJ 818; [2023] 10 CLJ 187, where two of the questions before the Federal Court are as follows:

(i) whether a loan agreement which charges an interest at the rate of 100% within a period of 30 days is legal under the law?

(ii) if the answer to question (i) is illegal, whether the court should still assist the moneylender to recover the principal amount lent?

[85] Both questions were answered in the *negative*. In the judgment, the Federal Court had cited with approval the following cases:

> [29] We find as apt the general pronouncements of law made by the Court of Appeal in the following two cases and one by the High Court, although the context and factual matrix of the cases differs in material respects from the present appeal:
>
> (i) *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara & Another Appeal* [2020] 4 MLJ 93; [2019] 1 LNS 894:
>
> > Taking the argument on illegality point, it is trite that the effect of any illegal transaction will result in the 'loss lies where it falls'. A party that suffers loss due to an illegal contract, cannot sue the other contracting party to recover losses. The law will not afford relief to those who claim entitlements from an illegal act.
>
> (ii) *Dr Mansur Hussain & Ors v Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] MLJU 1552; [2019] 1 LNS 661:
>
> > Suffice for us to say here that if an agreement is void ab initio for illegality, no restitution can happen. No court will lend its hands to unwind a void agreement that was illegal ab initio by restoring each party to its original position as though the illegal agreement never took place.
>
> (iii) *Yeow Guang Cheng v Tang Lee Hiok & Ors* [2020] 1 LNS 1696 (affirmed by the

Court of Appeal in *Tang Lee Hiok & Ors v Yeow Guang Cheng* [2022] 1 LNS 1510):

> To deter unlicensed moneylenders from continuing with their nefarious business, it is in the public interest for unlicensed moneylenders to be deprived of their illegal 'principal loan sums', interest and whatever ill-gotten property or benefit enjoyed from their unlawful moneylending business.

[86] Consequently, applying the above cases, we are of the considered opinion that since the SOGAs entered between TSM and DC are contrary to the MLA, they are void ab initio and the effect of such illegal transaction is that the 'loss lies where it falls'. Therefore, TSM cannot sue DC to recover losses. The law will not afford relief to those who claim entitlements from an illegal act.

CONCLUSION

[87] For the reasons enumerated above, we allow all the three appeals and set aside the decision of the learned High Court judge. In respect of DC's appeal in Appeal Nos 2155 and 2156, we only allow the prayer on the issue of declaration that the SOGAs are void under the MLA. Since all parties are involved in the illegal transaction, we make an order that parties are to bear their own costs.

Appeals allowed.

Reported by Ahmad Ismail